

INFORMAL ADVISORY OPINION NOS. 2001-1 THROUGH 2001-8

On November 4, 1998, the Hawaii State Ethics Commission received a charge filed against a state agency. In this charge, the complainant claimed that the agency's expenditure of special funds for a media campaign violated Hawaii Revised Statutes ("HRS") chapter 84, the State Ethics Code. Pursuant to HRS section 84-31(b), a copy of the charge was sent to the officials of the agency who had authorized the expenditure. The agency officials filed an answer to the charge on February 17, 1999. After reviewing this matter, the State Ethics Commission issued an Informal Advisory Opinion.

The charge concerned a 1998 ballot issue. The issue submitted to the voters was whether or not to hold a Constitutional Convention ("ConCon"). The agency opposed the ConCon. According to the agency's answer to the charge, the agency opposed the ConCon because it was concerned that a ConCon could abolish or severely limit many rights related to the agency's mission that were created by constitutional amendment. The agency spent funds on a media campaign urging a "no" vote on the question of whether or not to hold a ConCon. The complainant contended that the use of agency funds for a media campaign to oppose a ballot issue violated HRS section 84-13, the Fair Treatment section of the State Ethics Code.

In response to the charge, the agency filed an answer on February 17, 1999. In its answer, the agency discussed its authority to use the special funds. The agency essentially claimed that it had the authority to use the funds for broad purposes relating to its mission. The agency also claimed that the agency officials had broad discretion in determining the use of the special funds and that the expenditure of the special funds in this instance was proper. The answer did not specifically address the allegation that the agency had violated HRS section 84-13. Instead, it focused on the issue of the agency's statutory and constitutional authority to control the special funds.

HRS section 84-13, the Fair Treatment section of the State Ethics Code, reads, in relevant part, as follows:

§ 84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

. . . .

- (3) Using state time, equipment or other facilities for private business purposes.

The complainant contended that the expenditure of state funds on a media effort that promoted or opposed either a candidate or a ballot issue violated this section of the State Ethics Code.

The State Ethics Commission noted that it has consistently maintained that a state employee's use of state resources for campaign activities violates the Fair Treatment section. For example, in Advisory Opinion No. 258, issued in 1976, the Commission determined that the use of legislative equipment to prepare materials for a political party's convention violated HRS section 84-13(3). The Commission stated:

a political party basically exists to serve its own ends, to disseminate its own views and to get its members elected to office. Clearly, this was part of a larger public process. We did not believe, however, that this part could be considered a public as opposed to a business purpose. We therefore found the functions of this party or any other political party constituted a private business purpose and were therefore subject to the requirements of HRS § 84-13(3). [Advisory Opinion No. 258.]

Advisory Opinion No. 258 was concerned only with the use of state resources for a political party rather than with the use of state resources for a candidate or a ballot issue.

In Advisory Opinion Nos. 349 and 350, the Commission interpreted the Fair Treatment law to forbid the use of state resources for political campaigning. Advisory Opinion No. 349 concerned the use of a state residence for political campaigning. In deciding that the facility was essentially a personal residence, the Commission stated that, "it was our view that campaigning for public office was a private business purpose." In Advisory Opinion No. 350, the Commission considered a state official's request to use his picture in a campaign brochure for a candidate for election to the legislature. In this opinion, the Commission noted that:

. . . campaign activities were subject to the regulation of the Commission and [also] the state ethics code to the extent that a state employee used his position to unfairly advantage the political campaign of a candidate for office. Such regulation included, but was not limited to, using state time, equipment, and facilities for campaign purposes.

These opinions set forth the Commission's two basic and related positions on political campaigning. First, a state legislator or state employee may not use state resources for a campaign for political office. Second, a state legislator or state employee may not use his or her state position to give an unwarranted advantage to a candidate's political campaign. In numerous other opinions, the Commission reiterated these positions.¹

In Informal Advisory Opinion No. 93-1, the State Ethics Commission considered a situation in which state money appeared to have been used for campaign purposes. In that case, an elected official received a campaign contribution from a state agency. The

¹ See, for example, Advisory Opinions Nos. 559, 561, 89-1; Informal Advisory Opinions Nos. 93-1, 96-7, 96-8, 99-5, 97-3, 97-4, 99-1, 99-2, 2000-1, 2000-1; Decision No. 2.

contribution was in the form of check drawn on the state agency's checking account. The check was signed by the head of the state agency. It appeared that the decision to issue the check was made solely by the head of the state agency. There was no agency policy or position to support this decision. There was no indication that the Department to which the agency was attached was aware of the expenditure. The Commission determined that the use of state money for a candidate's political campaign appeared to be a violation of the Fair Treatment section of the ethics code.

In the instant case, the Commission was faced with a situation in which a state agency made a policy decision to spend special funds to urge a position on a ballot issue that was not connected to a particular candidate's political campaign. The amount of money spent on the ballot issue campaign appeared to be significant.

The Commission had not previously considered the situation in which a state agency makes a policy decision to support or oppose a ballot issue and then spends significant agency funds to campaign on the issue. The Commission noted, however, that a number of courts had considered this situation.² In its review of the case law, the Commission discovered that when an agency uses government funds to support passage or defeat of a ballot issue, two questions were generally raised. The first was whether or not the agency had the authority to use its funds for this purpose. The second was whether or not the agency's use of funds in a ballot issue campaign was prohibited by the First Amendment of the United States Constitution. In no case were ethics issues raised.³

After its preliminary review of the case law, the Commission determined that the agency's situation should be addressed not under the State's Ethics laws, but instead under constitutional law and under the statutory provisions that define the agency's authority. On December 28, 1998, the Commission wrote to the Department of the Attorney General and asked for an opinion as to whether the agency could use its special funds to fund a media campaign opposing a ballot issue. After submitting its request for an opinion, the Commission was in contact with the Department of the Attorney General about the opinion. However, the Department of the Attorney General did not issue an opinion.

² This situation has been treated as distinct from the situation in which an agency takes a position on a ballot issue but does not spend agency funds campaigning on it or spends only de minimus funds to express its opinion. See, for example, Colorado Taxpayers Union, Inc., v. Romer, 750 F.Supp. 1041 (D.Colo. 1990); Choice-in-Education League v. Los Angeles Unified School District, 17 Cal.App.4th 415 (1993).

³ See Mines v. Del Valle, 257 P. 530 (1927); Stanson v. Mott, 130 Cal.Rptr. 697 (1976); Mountain States Legal Foundation v. Denver School District, 459 F.Supp. 357 (D.Colo. 1978); Miller v. California Commission on the Status of Women, 198 Cal. Rptr. 877 (1984); Burt v. Blumenauer, 699 P.2d 168 (1985); Stevens v. Geduldig, 42 Cal.3d. 24 (1986); Alabama Libertarian Party v. City of Birmingham, Alabama, 694 F.Supp. 814 (N.D.Ala. 1988); Colorado Taxpayers Union v. Romer, 750 F.Supp. 1041 (D.Colo. 1990); Choice-in-Education League v. Los Angeles Unified School District, 17 Cal.App.4th 415 (1993); Citizens' Right to Vote v. Morgan, 916 F.Supp. 601 (S.D.Miss. 1996).

This charge raised constitutional issues as well as issues regarding the agency's authority to spend special funds. The Commission believed that these were issues that were more appropriately addressed by the Department of the Attorney General than by the State Ethics Commission. Unfortunately, it appeared that ongoing litigation involving the agency would continue to delay the issuance of an opinion from the Department of the Attorney General. Nonetheless, the Commission believed that the Department of the Attorney General was the appropriate agency to consider this matter. For this reason, the Commission dismissed this charge with an Informal Advisory Opinion. The Commission believed that any further proceedings should proceed through other forums.

Dated: Honolulu, Hawaii, April 4, 2001.

HAWAII STATE ETHICS COMMISSION

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